

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of Case

Crl. Appeal No. 143 of 2001

Date of Decision :- 09-6-2006

A.F.R. (Approved for Reporting)

Not approved for reporting

Date :- 09-6-2006

Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

**IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL**

Criminal Appeal No. 143 of 2001

(Old No. 30 of 1986)

Kharak Singh
S/o Sangram Singh
R/o Village Baan Patti Mundoli
Tehsil Karnprayag,
District – Chamoli

... Appellant

Versus

State of Uttaranchal

... Respondent

Sri P.S. Danu and Sri G.C. Kandpal, learned counsel for the appellants.
Sri Nandan Arya and Sri G.S. Sandhu, learned A.G.A. for the State.

Hon'ble J.C.S. Rawat, J.

This is an appeal against the judgment and order dated 03.12.1985 passed by Shri B.B. Agrawal, the then Sessions Judge, Chamoli convicting the appellant u/s 201 I.P.C. and sentencing him to undergo R.I. for a period of two years and to pay a fine of Rs. 1000/- in S.T. No. 19 of 1985. Feeling aggrieved by the said judgment and order, the present appeal has been preferred.

The facts, in a nutshell, are that a report was lodged by Smt. Amara Devi, wife of the deceased on 15.04.1983 to Naib Tahsildar Tharali alleging therein that on 14.03.1983 at about 4:00 a.m. the appellant Kharak Singh came to her house and asked her husband-Diwanu Ram to accompany him for hunting. It was also pointed out that they will return in the evening. The appellant Kharak Singh returned to his house on the same day but the deceased-Diwanu Ram did not come to his house. Smt. Amara Devi, wife of the deceased was informed about her husband after three days by Kharak Singh that Diwanu Ram and Deo Singh had gone for hunting. He also informed her that he remembered on the half way that his wife was ill therefore, he returned and did not accompany them for hunting. The appellant also stated to Amara Devi-wife of the deceased that he handed over the gun to Shri Deo Singh. The

complainant suspected and apprehended that her husband Diwanu Ram had been murdered and his dead body had been concealed. The case was registered and the Investigating Officer after investigating the case submitted the chargesheet against the three accused persons, namely, Deo Singh, Alam Singh and Kharak Singh u/s 302/201/109 I.P.C. and 25 Arms Act.

The accused-appellants denied the charges leveled against and contended that they have been falsely implicated in this case and claimed the trial.

The prosecution in support of its case against the accused-appellants, examined Amara Devi complainant (PW1). Amara Devi-PW1 is the widow of deceased Diwanu Ram. Badar Singh-PW2 is Malgujar and he was the person to whom the complaint was made and before whom Kharak Singh-appellant had given confessional statement. Bachan Singh-PW3 is the witness of circumstantial evidence against accused Alam Singh. Alam Ram-PW4 is the brother of the deceased-Diwanu Ram & a witness of extra judicial confession by Kharak Singh and the recovery of the dead body of the deceased Diwanu Ram. Hayat Singh-PW5 is the *Pradhan* of the village. Gaji Ram-PW6 is the brother-in-law of Diwanu Ram-deceased. Dr. P.D. Jakhmola-PW7 is the formal witness and he had conducted post-mortem on the dead body of the deceased –Diwanu Ram. Ratani Ram-PW8 is the witness who scribed the F.I.R. He was also witness of motive as to why Deo Singh might had committed the murder of Diwanu Ram. Maheshanand-PW9 and Mahabir Singh Tomar-PW10 are the Investigating Officer who had investigating the matter and submitted the chargesheet. Jaibir Singh Negi-PW11 is the S.D.M. who had recorded the statement of Kharak Singh u/s 164 Cr.P.C.

In the statement recorded u/s 313 Cr.P.C., the accused appellants denied the prosecution case and stated that they had been falsely implicated in this case.

The learned trial court after appraisal of the evidence on record found the accused-appellant, Kharak Singh guilty and convicted and sentenced him as mentioned above whereas the other accused namely, Deo Singh and Alam Singh were found not guilty of the charges and accordingly acquitted after giving benefit of doubt.

I have heard learned counsel for the parties and perused the record.

It was contended on behalf of learned counsel for the appellant that the accused-appellant had been convicted only on the basis of the statement recorded u/s 164 Cr.P.C. by the S.D.M. Perusal of the record reveals that the learned Sessions Judge while holding the conviction had held that there is a strong suspicion against the appellant Kharak Singh who saw the deceased Diwanu Ram but there is no direct or clearcut evidence to that effect. It was further contended that there was a confessional statement recorded u/s 164 Cr.P.C. that the appellant concealed the body of Diwanu Ram-deceased. Ex.Ka.-17 is the confessional statement recorded by S.D.M. on 08.06.1983 u/s 164 Cr.P.C. and appellant had stated that he, Diwanu Ram, Deo Singh and Alam Singh went for hunting and the gun was with Diwanu ram and that they were 20 to 25 paces ahead of Diwanu Ram and Deo Singh and accidentally the gun went off and hit the deceased Diwanu Ram and they all come back to their village thereafter they except Deo Singh went to the place of occurrence where they induce the appellant concealed the body by the bushes. Thereafter, they came to the home of Himmat Singh and narrated this incident. Himmat Singh told them that this incident should not be disclosed to any one and asked them to bury the dead body. The confessional statement recorded u/s 164 Cr.P.C. further reveals that the appellant had himself admitted in his statement recorded us/ 164 Cr.P.C. that he concealed the body by the bushes and thereafter he came to his house and he did not disclose this fact to the wife of the deceased. He tried to mislead other by saying that

on the half way he returned to his home because he was remind that his wife was ill. Thus he mislead about the incident also. Amara Devi-PW1 is the wife of the deceased. She had stated that on 15.03.1983 at about 4:00 a.m. appellant Kharak Singh came to her house and asked her husband-deceased to accompany him for hunting and also asked him that they would come back in the evening. The appellant came back to his home but her husband did not returned. On being inquired appellant by Amara Devi-PW1 after three days when he met her, he stated that in the half way he remembered that his wife was ill and he came back to his house. Deo Singh and the deceased went for the hunting. He concealed that real facts from his wife by the appellant. Ex.Ka.-2 is an statement signed by the appellant in which he had admitted that he had gone for hunting with Deo Singh and the deceased. He had his gun with him at the time of hunting. But he stated that from the midway he came back to his home and handed over the gun to Deo Singh. Dr. P.D. Jakhmola-PW7 conducted the post mortem and opined that the deceased died due to the fire arm injury.

I have gone through the entire statement recorded u/s 164 Cr.P.C. The accused was apprehended on 26.04.1983 and the said confessional statement was recorded on 8th June, 1983. It is admitted to the parties that the appellant had been arrested prior to the recording of the statement u/s 164 Cr.P.C. There is no doubt that the S.D.M. had been conferred the power of the Judicial Magistrate, 1st Class for recording the confession and recording the dying declaration in the State of U.P. at the time of the incident. Perusal of the statement clearly reveals that the accused appeared before the court and he straightway recorded the statement of the accused in a narrative form and thereafter he had given a certificate as provided u/s 164 Cr.P.C. The Cr.P.C. had provided certain safeguards before recording the statement. The Magistrate should follow the statement and when the accused appear before him for

recording the confession. He should warn the appellant that he is not bound to make the confessional statement and he should also warn if he does so the said confession may be read as the evidence against him. The accused should be given time of reflection for making the statement. When the accused on the date fixed appears before the Magistrate, he should first put a preliminary question to him so that he may be satisfied that the accused is making the confessional statement voluntarily. He should also explain that he is making the statement before a Judicial Magistrate, 1st Class. Section 164 (2) provides as under :-

“(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.”

In **(1995) 2 SCC 76 Shivappa Vs. State of Karnataka**, the Hon'ble Apex Court has held as follows:-

“6. From the plain language of Section 164 CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 CrPC, it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the rules framed by the High Court is imperative and its non-compliance goes to the

root of the Magistrate's Jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of sub-section (2) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.

7. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a 'voluntary' statement within the meaning of the provisions of Section

164 Cr.P.C. and the rules framed by the High Court for the guidance of the subordinate courts. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions strictly complied with."

In this case the Munsif Magistrate who had recorded the statement u/s 164 Cr.P.C. did not disclose to the appellant that he was a Magistrate and that the confession has been recorded by him in that capacity nor made any enquiry to find out whether he had been influenced by anyone to make the confession. The Hon'ble Apex Court also held that perusal of the statement of the Munsif Magistrate was quite dubious that he did not make any serious attempt to ascertain the voluntary character of the confessional statement and that impel the Hon'ble Judges of the court to hold that the evidence on record does not establish that the confessional statement of the appellant recorded u/s 164 was voluntary.

It is also pertinent to mention here while putting to the preliminary question to the witnesses, the Magistrate should endeavour that no police and police officials were present in the court so that it may lend assurance to the appellant that he is not under influence of any police officer. He should specifically asked as to whether the appellant had given any allurement of being released of being scuffle in the matter. If the Magistrate had any iota of doubt about it being voluntary, the Magistrate should refuse to record the confession. In **Kartar Singh Vs. State of Punjab, 1994 SCC (Cri) 899**, the Apex Court has held as under:-

"386. The Magistrate before recording the confession should properly question the accused, as far as may be necessary, elicit from him whatever facts he is willing to state; to understand exactly

what his meaning is and how far he intends his confession or admission to go. The confession must be recorded with great care and circumspection. The Magistrate must record the questions put to the accused to ascertain whether the confession was of voluntary nature, that he will not have to go back to the police custody after statement was recorded; to warn the accused of the consequences which would ensue if the confession is false or if he has in the hope of release implicated himself and to ask the accused whether the police or any other person had subjected him to ill-treatment etc. no hard and fast rule could or should be laid down as to the procedure which would be adopted when an accused is brought before the Magistrate to record his confession. Confession extracted while in custodial interrogation excites suspicion of its voluntariness. But when it is recorded by the Judicial Magistrate it removes the stains and assures voluntariness. The object of keeping the accused/suspect in judicial custody and giving him sufficient time for reflection and necessary warnings reinforces it since sufficient time given the accused frees himself from the pressure of police interrogation and for reflection before making confession. It will have sobering effect on the accused/suspect.

387. In **Nazir Ahmad Vs. King-Emperor** the Privy Council held that the Magistrate acting under Section 164, though is not acting as a court, yet he is a judicial officer, and both as a matter of construction and of good sense, the recording of the confession shall be in compliance with Section 164 read with Section 364 (Section 281 of 1973 Code). The confession shall be recorded in the manner prescribed under Section 164 and the standing orders and in no other way. The Magistrate had not recorded the confession as enjoined under Section 164. He tendered his oral evidence of the confession made by the accused. It was held that the confession was inadmissible and the accused was acquitted. In **Ram Chandra Vs. State of U.P.** this Court held that the confession must be recorded

in open court and during the court hours unless for exceptional reasons it is not feasible to do so. This is a very important provision which emphasizes that the Magistrate in recording confession is exercising 'part of his judicial function' in the manner prescribed by the law. One of the instructions provides that the Magistrate should enquire the reason why the accused is making the confession knowing that it may be used against him. In that case since the confession was recorded in the police lock-up, it was held that it was inadmissible.

*388. It would thus be clear that the provisions of Section 164 are mandatory and it is the duty of the Magistrate to follow the procedure strictly. If he fails to do so, he would be failing in his discharge of judicial duty. If the statement or confession was recorded in strict compliance with Section 164 and 281 and the rules made thereunder, the confession would be admissible, although it is retracted. In **Nazir Ahmad Case** it was held that a confession recorded by a Magistrate without conforming to the provisions of Section 164 or Section 364 of Cr.P.C. renders the precautions laid in those provisions of such trifling value as to be almost idle. A confession duly recorded with the prescribed certificate appended to it may be presumed to be voluntary and be admissible in evidence subject to the conditions contained in Section 24 to 30. A retracted confession may form basis for conviction of that accused, if it receives some general corroboration from other independent source.*

390. It is equally settled law that a statement cannot be said to be properly recorded under Section 164 of the Code if a police officer is present or allowed to be present at that time or is allowed to put question to the accused. Equally it is settled law that confession would not be recorded during night time or late hours after the accused has been subjected to interrogation by the police officer for 3 to 4 hours and had broken down under the continued interrogation. It is not enough for a Magistrate to give the accused a warning that

*the confession, if made, would be used against him but it is essential that he should put questions to satisfy himself that the confession was a fact voluntary and the questions with answers must be recorded. The court before whom the confession is used must have material on which it can be satisfied that the confession was in fact voluntary. It is mandatory under Section 164 of the Code that the Magistrate must record the confession strictly in accordance with the prescribed procedure. Sufficient time should be given to the accused for reflection, but no hard and fast rule could be laid as to the proper time. It is settled law that at least 24 hours should be given to the accused to decide whether or not he should make a confession. If the circumstances generate any suspicion that the accused was induced or coerced or threatened to make a confession, even longer period should be given as held by this Court in **Swaran Singh Vs. State of Punjab** so much is the concern, protection and safeguard provided by the Evidence Act.”*

When the Magistrate had taken all necessary precautions to ensure that the accused had sufficient time to reflect before he made the confessional statement and that he was under no fear, or threat or inducement to make the statement then confession can be acted upon. (See **Bheru Singh V. State of Rajasthan, 1994 SCC (Cri) 555.**

In the instant case the S.D.M.-Jaibir Singh Negi (PW11) appeared before the court below and he had stated that he had recorded the statement of the accused-appellant u/s 164 Cr.P.C. on 08.06.1985. He further stated that he had given warning to the accused-appellant before recording the statement. But this fact does not reveal from the record that S.D.M. had given any warning before recording the statement of the accused-appellant. He had also not put any preliminary question before recording the statement. Thus the said statement has been recorded without affording that whether it was voluntary or not or whether it was given under duress, threat

and inducement or not. The statement recorded by the S.D.M.-PW11 cannot be relied upon as has been elaborately discussed above. If the statement recorded u/s 164 Cr.P.C. cannot be relied upon the findings recorded by the learned Sessions Judge becomes erroneous. There is no other evidence against the appellant to be convicted.

In view of the above discussion, I am of the view that the prosecution has not established the guilt beyond any reasonable doubt against the appellant. I find that the learned trial court has erred in convicting and sentencing the appellant. Hence, the appeal is allowed and the conviction and sentence against the appellant awarded by the Trial court are set aside.

Let the record alongwith a copy of this judgment be sent back to the trial court immediately for necessary action and compliance and the compliance report to be submitted within three months.

(J.C.S. RAWAT, J.)

9TH June, 2006
Shiv